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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1321

C. A. POTEET, R. O. JACKSON, HARRY WRIGHT, STEVE MITCHELL AND CLAUDE McGLADE,
Petitioners (Appellants Below),

vs.

STEVE ROGERS,
Respondent (Respondent Below)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

To: The Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully state as follows:

I

Summary Statement of the Matter Involved

This is an action for injunction (R. 2-8) filed April 21, 1945 in the Circuit Court of Jackson County, Missouri by Respondent against Petitioners and others, praying in-

junction, alleging violation of Section 8301, R. S. Mo. 1939 *, which, inter-alia, condemns the entering into of combinations in restraint of trade or competition in the transportation, purchase or sale of any commodity, or any article or thing bought or sold, and declaring such acts to be a conspiracy in restraint of trade.

* Section 8301, R. S. Mo., 1939, provides as follows:

> "*Combinations in restraint of trade declared a conspiracy.* Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

A

PARTIES AND ORGANIZATIONS INVOLVED

Respondent, operator of a dairy farm in Ray County, Missouri (R. 19), owns trucks equipped for carrying milk from his farm to market outlets (R. 20), holds a permit from the Office of Defense Transportation to carry milk over a definite route to Borden Dairy Company in Kansas City, Missouri (R. 21, 27). He and his employees carry not only Respondent's own milk, but for hire carry milk produced upon other farms along his route (R. 21). He claims to be an independent contractor and not an employee of any person. He is one of about 55 other milk haulers (R. 195) hauling to the Kansas City, Missouri and Kansas City, Kansas processing plants, each owning a separate route (R. 107), some of whom produce milk themselves and also haul for hire for others along their route, and some

of whom produce no milk but merely haul for hire for producers along their route.

Petitioners are officers and members of Local No. 207, Milk Drivers and Dairy Employees Union (R. 93-4), chartered by Brotherhood of Teamsters, Chauffeurs & Warehousemen of America, an international union affiliated with American Federation of Labor (R. 88, 90A). The International union constitution (R. 88, 90A, Art. II, Secs. 1, 2) gives it jurisdiction over all teamsters, chauffeurs and helpers * * * all classes of dairy employees, inside and outside * * * all other workers employed in the manufacture of milk and dairy products * * * also all persons who own and operate a team and vehicle may be eligible for membership; by-laws of the Local (R. 91, 92A, Sec. 3), state it was organized for the purpose of bettering conditions in the milk industry; that it claims jurisdiction over all such persons engaged in this craft in Jackson County, Missouri and adjoining territory, supplying these products to Greater Kansas City and suburbs, and that the Local, organized along industrial lines, has for members all kinds of dairy workers, including inside and outside helpers, wagon and truck drivers (R. 93).

The local union has presently effective bargaining agreements with all milk processing plants in Kansas City, Missouri, including Borden Dairy Company (R. 95, 106A). All dairy employees, including plant workers and employees delivering processed products, are union members (R. 93), as are some milk haulers directly employed by the dairies to operate dairy owned trucks. Some 42 independent haulers are also union members, but not all (R. 108, 110-112A et seq.) Respondent is not a union member.

The Pure Milk Producers Association, not a party, is a cooperative marketing association composed of milk producers along various routes (R. 196). Hauling contracts, both oral (R. 21) and written (R. 58), are made

with a committee of producers along such routes (R. 197). Respondent, a member and its Vice President, had an oral contract for hauling (R. 21). The written contracts state they are to be construed as subject to the individual contracts of the member producers with the Producers Association (R. 58), and Respondent's membership agreement with the Association (R. 160A) permits it to prescribe regulations relative to production, handling, delivering, hauling and charges for service, of milk produced by members, and commits the member to deliver milk to such person, at such places, in the manner designated by the Association, under a penalty (R. 198).

B

History of Case

The contested issue is the right of union members, in an organizational campaign to bring in the non-union haulers, to refuse to accept deliveries of milk from non-union haulers. After issues made, trial was in the lower court and a decree was rendered in favor of Respondent against Petitioners (R. 15-17), enjoining them, their agents and all persons claiming under or acting under the direction or authority of them, from hindering, interfering with, preventing or endeavoring to prevent, interfere with or hinder in any respect whatsoever the receiving, unloading and processing of any milk carried in any truck operated by Respondent or his agents, to the Borden Dairy. A Motion for New Trial (R. 177) in which, it being the first opportunity, specific Federal Constitutional questions were raised by petitioners (R. 179), was unsuccessful (R. 17).

Appeal was taken from said decree to the Supreme Court of Missouri (R. 18, 179). The cause was argued before Division No. 2 of said court, which affirmed and remanded, with directions to redraft the decree in such manner to

permit Petitioners, by peaceful picketing and persuasion and means not involving violence, intimidation and coercion, to advocate the cause of their own union and thereby advance their own interest so as to obviate criticism of the form of the decree as specified in the case of *Lauf* v. *E. G. Skinner & Co.*, 303 U. S. 323, 58 S. C. R. 578 (R. 181).

Thereafter Petitioners filed in the Supreme Court of Missouri Motion for Rehearing, to transfer to the Court En Banc under the provisions of the Constitution, and in the alternative for a rehearing or transfer to the Court En Banc (R. 182), which motion was sustained (R. 193), said cause was reargued before the Supreme Court of Missouri En Banc (R. 193), and the divisional opinion was adopted on February 10, 1947 as the final decision in this cause by the court of last resort in the State of Missouri (R. 193-218).

C

PLEADINGS, ISSUES AND FACTS

The petition (R. 2-8) states the object of the alleged combination was to bring about restraint of trade and competition in the transportation, purchase and sale of milk and in the business of contracting to haul milk from producers to processing plants in the Kansas City territory, so as to create a monopoly; to prevent milk producers from contracting with any one to haul milk, not a union member, except on such terms and conditions as might be dictated by the union officers; to destroy the business and property rights in contracts of contract haulers under contracts with Pure Milk Producers' Association. The alleged implementing means was that Petitioners agreed to prevent any person from entering into such a contract unless they first became union members in a union governed by by-laws permitting no one to retain membership without

complying therewith, which rules governed hours of employment and rate of pay; that petitioners, to prevent such milk hauling until all persons making contracts for routes became union members, conspired to cause other union members employed at dairy plants in Kansas City to refuse to receive and unload milk unless carried by a union member; that on April 20, 1945 (R. 5), Respondent delivered milk to Borden Dairy and Petitioner Mitchell, acting for the other Petitioners, in pursuance of the conspiracy, refused to receive or permit Respondent to unload the milk; that such action prevented free and unhampered trade in milk, decreased and lessened competition among contract haulers and tended to create a monopoly, making it impossible for farmers and milk producers to have milk carried from farm to dairy except by union haulers, upon terms dictated by the union, thus destroying free competition, jeopardizing the business of farmers and haulers, subjecting them to control of the union, and destroying their property rights in such contracts, causing the destruction of milk; detrimental to the public interests, a hardship on milk consumers, and producing an artificial milk shortage.

The answer (R. 8-15) is framed to deny the conspiracy and acts in restraint of trade by the union or its members and sets up as defense that by charter and by-laws the local union has jurisdiction over all dairy employees, milk and dairy workers, teamsters and vehicle owners engaged in the business; its organization along industrial lines for bettering milk industry conditions; its membership; its achievements to better wages and working conditions; its superior position to non-union haulers of milk in such respects; the adverse effect of non-union membership on its affairs; that all Borden Dairy employees are members, as are many of the milk haulers; its institution of an organizational campaign in February, 1945 to bring non-union haulers into membership; its ineffective efforts to

bargain collectively with the Producers Association; its efforts, after notification to milk haulers, to make them members, and thereafter the putting into effect of its duly authorized resolutions for its member employees in Borden Dairy not to receive or handle milk from, or work with, non-union haulers; the refusal to receive Respondent's milk on April 20, 1945. It alleges all such acts are part of its organizational campaign and were directed at no particular individual and were peaceful and without violence, without malice toward Respondent or intent to inflict injury on him, but only for the purpose of securing better working conditions for union members, and was aimed at all non-union hauling and delivering of milk as such and not specifically directed at Respondent; that such activities constitute a bona fide labor dispute and that Petitioners' acts were not contrary to law, public policy or statute and that hauling and delivery of milk is a personal service and occupation and cannot be the subject of monopoly or in restraint of trade within the meaning of Sec. 8301 R. S. Mo., 1939.

In addition to the facts stated in the foregoing preliminary statement, these further facts appear from the findings in the opinion of the Supreme Court of Missouri:

Early in 1945, after milk plant employees had been organized, seven or eight rural milk haulers asked to join the union (R. 199); theerafter in March, Petitioner Jackson conferred with the Producers Association ineffectually, attempting to negotiate a contract (R. 199, 122-3); in April he called a meeting of haulers, personally notifying each by letter, asking them to join and stated that at the meeting "a date will be set when the members of Local 207 will refuse to unload any milk hauler who is not a member"; thereafter fifteen more haulers joined and on April 19 the Union Executive Board unanimously authorized Petitioner Jackson to notify all men receiving milk at the seven organ-

ized plants "to receive no milk or dairy products from any man driving a truck, who is not a member of Local 207. In order not to inconvenience the public, just stop any two men at this time, pending an anticipated and threatened court case" (R. 200).

The organizational efforts never intended to interfere with any producer who brought only his own milk to a plant in his own truck (R. 200). Reasons for desiring to organize milk haulers were that they drew much less pay than union workers; this disparity in earnings by the two classes of workers caused bad conditions in the milk plants and had a tendency to cut down wages and working conditions secured by the union (R. 121-2). Non-union haulers received from $25.00 to $40.00 per week without limitation of hourly work days, were not paid over-time, had no vacation allowance and no grievance procedure or contract, all of which were enjoyed by union workers (R. 201).

April 20, 1945, Respondent drove to Borden Dairy, hauling milk produced by himself and 27 other dairymen on his route and Petitioner Mitchell, on the receiving dock, refused to accept the milk. The same date another non-union hauler was refused discharge of his load at the Aines Dairy (R. 202).

There were no threats of physical violence or disorder of any kind then or thereafter on the part of union employees, nor has there been since the suit was filed the next day (R. 202-3), and since the action has been pending union members have received all milk, including Respondent's.

The evidence shows both refusals to receive milk were done in the actual industrial area involved (R. 28-36, 62). The record contains no evidence of any combination between union workers and their employers to achieve the desired results. There is no evidence showing grave and immediate danger to the community within the meaning of that term under this court's decisions.

II

Jurisdictional Statement

1. It is contended that this court has jurisdiction to review the decree in question under the provisions of the Judicial Code, Section 237, as amended, (8 F.C.A. Title 28, Par. 344 (b)), in that a final decree has been rendered by the highest court of the State of Missouri in which a decision could be had, where rights, privileges and immunities specially set up and claimed by Petitioners under the Constitution of the United States were denied by the judgment of the Supreme Court of Missouri.

2. Date of the opinion and judgment was February 10, 1947 (R. 193).

3. The Federal question decided adversely to Petitioners is that the Missouri Supreme Court's construction and application of the provisions of Section 8301 R. S. Mo. 1939 to the facts in this case and in the decree enjoining Petitioners, is repugnant to both the 1st and 14th Amendments to the Constitution of the United States in that the decision of the court in applying said statute abridges the freedom of speech and the right of petitioners, citizens of the United States, peaceably to assemble as guaranteed therein, in that the acts of Petitioners in refusing to work with non-union members and in refusing to accept milk delivered by Respondent, a non-union member, are, under the facts, within the right of free speech and peaceable assembly and infringed by the decree of the Supreme Court of Missouri.

4. The state in the proceedings in the Circuit Court of Jackson County, Missouri, at which these Federal questions were raised was at the first opportunity therefor in the Motion for a New Trial. The questions were raised in the

manner heretofore set forth (R. 179). In the Supreme Court of Missouri, said questions were raised through Specification of Errors, setting forth the questions as above stated, and in the Motion for rehearing to transfer to the court En Banc (R. 189-192). This point was directly determined by the Supreme Court of Missouri in holding Petitioners to be guilty of a conspiracy, in violation of Section 8301 R.S. Mo. 1939, which was not protected by the 1st and 14th Amendments to the Constitution of the United States.

The opinion of the Missouri Supreme Court directly states (R. 215) that Missouri has no such statutes as the Norris-LaGuardia, Sherman Anti-trust and Clayton Acts and that "our law remains the same as the Federal law was before the passage of the three acts mentioned in the last paragraph. And in the absence of an authoritative decision to the contrary we follow our *Lohse* case, *supra* *, and hold the conspiracy between appellants violated Section 8301 of our statutes and the common law, and was not protected by the 1st and 14th Amendments and Sections 8, 9, and 10, Art. I, Const. Mo. 1945."

5. The Federal questions involved are substantial for the following reasons:

Because there is involved a claimed infringement, abridgment and restraint upon the fundamental right of freedom of speech and the right of the people peaceably to assemble as guaranteed in the 1st Amendment, which are applicable to the states under the provisions of the 14th Amendment to the Constitution of the United States, and further, that there is involved the question of whether the acts of Petitioners and the local union in refusing to work with non-

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* *Lohse Patent Door Co.* v. *Fuelle*, 215 Mo. 421, 444(1), 455(4), 114 S. W. 997, 1002(1), 1003(2), 128 A. S. R. 492, 22 L. R. A. (N. S.) 607.

union members and in refusing to accept milk delivered by Respondent, under the facts shown in evidence, are such rights as are guaranteed by these constitutional amendments, all of which rights are, in all the decisions of this court, of prime importance, not to be defeated by "insubstantial findings of fact, screening reality".

III

The Questions Presented

The questions presented are as follows:

1. Do the constitutional rights of free speech and peaceable assembly guaranteed by the 1st and 14th Amendments to the Constitution of the United States protect a bona fide labor organization and its members engaged in an organizational campaign to bring into membership non-union milk haulers engaged in the same industry, hauling milk to union members' employer, when such efforts are sought to be accomplished by the union members concertedly refusing to work with such non-union milk haulers or handle products delivered to the union members' employer by non-union milk haulers, there being shown (1) no violence but only peaceable acts by such union members, (2) no combination by union members with their employer to achieve such result, (3) all such acts being done in the industrial area involved, and (4) no showing of grave and immediate danger to interests which the State may lawfully protect?

2. If so, are such rights protected from State action by injunction against such union members upon a final State Court finding and judgment that such acts constituted a violation of Sec. 8301 R. S. Mo. 1939 condemning the entering into combinations in restraint of trade or competition in the transportation, purchase or sale of any commodity

or any article or thing bought or sold, and declaring such acts to be a conspiracy in restraint of trade?

3. Did the action of the Supreme Court of Missouri in applying Sec. 8301 R. S. Mo. 1939 to the facts shown in evidence, resulting in the judgment and decree, infringe and abridge such rights?

IV

Reasons Relied On for the Allowance of the Writ

1. The Missouri Supreme Court has decided a Federal question of substance, not theretofore determined by this Court, in holding that the constitutional rights of free speech and peaceable assembly guaranteed by the 1st and 14th Amendments to the Constitution of the United States do not protect a bona fide labor organization and its members engaged in an organizational campaign to bring into membership non-union milk haulers engaged in the same industry, hauling milk to union members' employers, when such efforts are sought to be accomplished by the union members concertedly refusing to work with such non-union milk haulers or handle products delivered to the union members' employers by the non-union milk haulers, there being (1) no violence but only peaceable acts by such union members, (2) no combinations by union members with their employers to achieve such results, (3) all such acts being done in the industrial area involved, and (4) no showing of grave and immediate danger to interests which the state may lawfully protect, as against the general anti-monopoly and restraint of trade provisions of Sec. 8301 R. S. Mo., 1939.

2. The Missouri Supreme Court, in said case, decided the Federal question of substance as to Petitioners' constitutional rights in favor of Respondent herein by holding

Petitioners' claimed rights were not protected by the 1st and 14th Amendments to the Constitution of the United States, which decision is not in accord with the applicable decisions of this court, including the cases of *Senn* v. *Tile Layers' Protective Union*, 301 U. S. 468 l. c. 478, 57 S. C. R. 857; *Thornhill* v. *State of Alabama*, 310 U. S. 88, 60 S. C. R. 736 l. c. 740-45; *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 l. c. 99, 61 S. C. R. 122 l. c. 126; *Milk Wagon Drivers Union of Chicago* v. *Meadowmore Dairies*, 312 U. S. 287 l. c. 297-9, 61 S. C. R. 552 l. c. 556-7; *American Federation of Labor* v. *Swing*, 312 U. S. 321 l. c. 325-6, 61 S. C. R. 568 l. c. 570; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769 l. c. 774-5, 62 S. C. R. 816 l. c. 818-9; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 64 S. C. R. 854 l. c. 858; *Thomas* v. *Collins, Sheriff*, 323 U. S. 516 l. c. 530-2, 65 S. C. R. 315 l. c. 323; *Hunt* v. *Crumboch*, 325 U. S. 821 l. c. 824, 65 S. C. R. 1545 l. c. 1547.

Decisions of other courts sustaining Petitioners' contention: *Stapleton* v. *Mitchell, Attorney General*, 60 Fed. Supp. 51; *Alabama State Federation of Labor* v. *McAdory*, 18 Sou. (2d) 810; *Singer et al.* v. *Kirch Beverages, Inc.*, 65 N. Y. S. (2d) 400 l. c. 402.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of Missouri, commanding said court to certify and send to this Court a full and complete transcript of the record and of the procedure of said Supreme Court in the case numbered and entitled on its docket No. 39682, Steve Rogers, Respondent *vs.* C. A. Poteet, R. O. Jackson, Harry Wright, Steve Mitchell and Claude McGlade, Appellants, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said

Supreme Court of Missouri be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 3d day of April, 1947.

C. A. POTEET,
R. O. JACKSON,
HARRY WRIGHT,
STEVE MITCHELL,
CLAUDE MCGLADE,
Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1321

C. A. POTEET, R. O. JACKSON, HARRY WRIGHT, STEVE MITCHELL AND CLAUDE McGLADE,
Petitioners (Appellants Below)

vs.

STEVE ROGERS,
Respondent (Respondent Below)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion in the Supreme Court of Missouri (R. 194-218) is reported in 199 S. W. (2d) 378.

II

Jurisdiction

1. The date of the judgment and decree to be reviewed is February 10, 1947 (R. 193).

2. The statutory provision which is believed to sustain the jurisdiction of this court is the Judicial Code, Sec. 237, as amended, (8 F. C. A., Title 28, Par. 344 (b)).

3. The nature of the case involves the right of a bona fide labor organization and its members engaged in an organizational campaign to bring into membership non-union milk haulers engaged in the same industry, hauling milk to union-members' employer, when such efforts are sought to be accomplished by the union members concertedly refusing to work with such non-union milk haulers to handle products delivered to the union-members' employer by non-union milk haulers, such union efforts to induce membership being (1) without violence, (2) without combination by union members with their employer, (3) all union acts being done in the industrial area involved, (4) the facts showing no grave or immediate danger to interests which the state may lawfully protect, such rights being claimed by Petitioners under the guaranties of free speech and peaceable assembly contained in the 1st and 14th Amendments to the Constitution of the United States and the infringement thereof by the construction and application by the Missouri Supreme Court of the provisions of Sec. 8301 R. S. Mo., 1939, and the direct holding under the evidence, that the constitutional guaranties are not infringed. Such rulings by the Missouri Supreme Court are believed to bring the case within the jurisdictional provisions relied on.

4. The cases believed to sustain said jurisdiction are as follows:

Senn v. *Tile Layers' Protective Union*, 301 U. S. 468 l. c. 478, 57 S. C. R. 857.

Thornhill v. *State of Alabama*, 310 U. S. 88, 60 S. C. R. 736 l. c. 740-45.

Milk Wagon Drivers Union v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 l. c. 99, 61 S. C. R. 122 l. c. 126.

Milk Wagon Drivers Union of Chicago v. *Meadowmore Dairies*, 312 U. S. 287 l. c. 297-9, 61 S. C. R. 552 l. c. 556-7.

American Federation of Labor v. *Swing*, 312 U. S. 321 l. c. 325-6, 61 S. C. R. 568 l. c. 570.

Bakery & Pastry Drivers v. *Wohl*, 315 U. S. 769 l. c. 774-5, 62 S. C. R. 816 l. c. 818-9.

N. L. R. B. v. *Hearst Publications*, 322 U. S. 111, 64 S. C. R. 854 l. c. 858.

Thomas v. *Collins, Sheriff*, 323 U. S. 516 l. c. 530-2, 65 S. C. R. 315 l. c. 323.

Hunt v. *Crumboch*, 325 U. S. 821 l. c. 824, 65 S. C. R. 1545 l. c. 1547.

Decisions of other courts sustaining Petitioners' contention are:

Stapleton v. *Mitchell, Attorney General*, 60 Fed. Supp. 51.

Alabama State Federation of Labor v. *McAdory*, 18 Sou. (2d) 810.

Singer et al. v. *Kirch Beverages, Inc.*, 65 N. Y. S. (2d) 400 l. c. 402.

III

Statement of the Case

This has already been stated in the preceding petition under I, (pages 1 to 8), which is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The Supreme Court of Missouri erred in holding that the constitutional rights of free speech and peaceable as-

sembly guaranteed by the 1st and 14th Amendments to the Constitution of the United States do not protect a bona fide labor organization and its members engaged in an organizational campaign to bring into membership non-union milk haulers engaged in the same industry, hauling milk to union members' employers, when such efforts are sought to be accomplished by the union members concertedly refusing to work with such non-union milk haulers or handle products delivered to the union members' employers by the non-union milk haulers, there being (1) no violence but only peaceable acts by such union members, (2) no combinations by union members with their employers to achieve such results, (3) all such acts being done in the industrial area involved, and (4) no showing of grave and immediate danger to interests which the state may lawfully protect, as against the general anti-monopoly and restraint of trade provisions of Sec. 8301 R. S. Mo., 1939.

V

ARGUMENT

Summary of Argument

POINT "A"

The state statute as construed and applied by the Supreme Court of Missouri and the substantial effect of its decision operates to deny and impair the constitutional rights asserted by petitioners. The Federal claim, if recognized and enforced, will require a different judgment. The application of Sec. 8301 to petitioners, by the Missouri Supreme Court's findings of fact, is upheld as against petitioners' claim of repugnancy to the Federal constitutional right of free speech and peaceable assembly. The e findings of fact against petitioners necessarily involve decision on a question of law raised by petitioners' claim of right

under the Federal Constitution. The findings are without substantial support in the evidence, are evasive and colorable, and the findings of fact and conclusions of law are so intermingled that in order to pass on the Federal right claimed, the facts in the case must be analyzed. There are no adequate non-federal grounds to support the judgment as against the decisions of this court in applicable cases cited herein.

POINT "B"

The Missouri Supreme Court in its opinion specifically denies the Federal rights claimed by the petitioners (R. 215, 199 S. W. (2d) l. c. 391). The decision therefore holds that under the facts petitioners are guilty of a conspiracy and combination in restraint of trade in violation of the Missouri Supreme Court's construction of Sec. 8301, and that injunction should be applied against the organizational activities as conspirative, as against petitioners' claim that such acts as are shown by the evidence, and the construction and application of the statute to such acts, infringe and abridge their rights of free speech and assembly under the United States Constitution.

The Missouri Supreme Court makes certain findings of fact in an effort to give legal basis for its decision. The only things the Supreme Court finds petitioners did were:

(1) Make a bona fide effort to organize the hired non-union milk haulers bringing in milk to plants where Local 207 had a closed shop contract. The haulers sought to be brought into the union were only haulers and their employees hauling for hire. No effort was made to include anyone who hauled only milk produced by himself.

(2) After failure to negotiate a contract with the head of the Pure Milk Producers Association, which association controlled the routes (R. 197, 199 S. W. (2d) 381), the union, through petitioners, notified such milk haulers

working for hire to join, and that after April 19, 1945 no member of the union would unload milk delivered by any such not a member of the union, and

(3) Refuse the unloading of Respondent's milk on that day and that of one other hauler to another dairy.

These are all the essential facts upon which the Missouri Supreme Court bases its opinion. From these facts it says:

1. That by admitting the doing of such acts in order to enforce a closed shop in the milk hauling business, that *ipso facto* a restraint of trade in the transportation of milk was entered into; this without reference to the fact that such acts, from their very nature, could not and were not intended to dominate the business of milk hauling by the Respondent, affect prices or bear any relation to supply or demand of milk. Such construction is directly contrary to the evidence (R. 199-202, 91-3). Netiher the union nor Petitioners buy milk, sell milk, produce milk or have any interests in such things (R. 125-6), but only want union members to haul milk, because when union members process milk, deliver it at retail, and many union drivers haul milk to the dairies, working with non-union haulers, including Respondent, who do not enjoy the advantages secured by the union for its members in the trade, it has an adverse effect upon the union and its members in retaining the rights they have secured through the years (R. 121-2).

2. The Missouri Supreme Court then says that even though no violence, threats or intimidation, malice or breach of contract was involved in the acts of petitioners in conceding that they might have done as individuals, all that they did do (R. 206), that when *all* union members at *all* the dairies so agreed, the action was conspirative if Respondent's milk hauling business would thereby be destroyed.

Respondent produced no evidence that his business would be destroyed. There is no proof that all the union members at all the plants refused to accept milk. Respondent was the only one at Borden Dairy and one other, not a complaining party, was the only other (R. 202). The not a complaining party, was the only other (R. 280). The clear, undisputed evidence is that only "any two non-union drivers" would be denied unloading (R. 200).

3. Notwithstanding this evidence, the Missouri Supreme Court says that the evidence of Petitioners did not show there were other markets available for haulers and producers (R. 205) and further reasons that because the particular deliveries of milk of Respondent and one other that were refused, were spoiled, that this justifies the assumption that milk could not be hauled on longer trips (R. 206). There was no evidence by Respondent to prove this.

The findings set forth in 2 and 3 *supra*, are purely speculative on the part of the Missouri Court, without evidence in support, and shifts the burden of proof to petitioners to disprove facts which under all rules of law would be on Respondent to prove, to justify a finding of a conspiracy.

4. The court then, after saying there were no threats or violence, proceeds to consider and find as a fact that the notification letters of intended refusal to unload non-union hauled milk, constitute a threat (R. 206-7). It further admits that Petitioners' primary motive was to better wages, hours and working conditions, but that the direct and immediate intent was to force non-union haulers and subsequently destroy their contract hauling business (R. 208). From these findings (actually unsupported by evidence but only assumed to exist) the Missouri Supreme Court states that petitioners had "a constructive malicious intent to dominate and destroy the competing business" (R. 207). Then the Supreme Court gives the true reason for its

opinion. In referring to Federal legislation such as the Clayton, Norris-LaGuardia and National Labor Relations Acts, it states that these were passed "to protect the weak against the strong. Now conditions are reversed and labor organizations have acquired overpowering strength," and that in such cases "State public policy does not lend itself to a furtherance of such an object."

Considering the studied effort of the opinion by conjecture, assumption and piling inference on inference to reach the desired findings of facts thought sufficient to support affirmance of the decree, when the last quoted statement is considered, Petitioners consider it a fair statement that the opinion reaches the result it does from a pre-conceived opinion of the desired restrictions the court thinks should be placed on labor organizations, disregarding the whole philosophy of many decisions of this Court.

It does not follow upon any reasonable basis of logic, that such attempts by union members must necessarily include an attempt to destroy Respondent's contract hauling business. This conclusion could not possibly be drawn unless and except the intent of the court is to hold that no union, by peaceable means, may, in order to protect its economic standards, the mutual welfare of the members thereof and their rights guaranteed under the Constitution of the United States, and to obtain a determination and settlement of a labor controversy, ever refuse to work with non-union members or refuse to handle, install, use or work with particular materials, equipment or supplies, because not produced, processed or delivered by members of the same labor organization, or express in the exercise of the right of free speech such intentions, or make known to the public and to fellow employees such intentions or the facts relating to the issue involved in the dispute. In other words, the necessary consequences of such activities will always be a determination that such was not the true in-

tent of the union members, but that the actual primary intent was the sinister intention to damage and destroy the business of non-union members. If such is the law, and if unions under such circumstances are to be subject to the doctrine of "constructive malicious intent" arrived at by piling inference upon inference and making conjecture a basis for fact finding and legal conclusions, without supporting positive evidence, then in Missouri all the benefits and accomplishments of the unions for the betterment of their members' living and working conditions are wiped out by the court's decision, and Federal constitutional guaranties are subordinated to construction and application of the Missouri statute.

In this case there is *no* evidence to find the real purpose of Petitioners was maliciously to destroy Respondent's business, or that their efforts for "self-benefit" were merely "ostensible" (R. 207).

The opinon entirely overlooks the purpose of a labor dispute, and that all the evidence here clearly shows that all acts of Petitioners were done in pursuance of a labor dispute and to obtain the benefits to be achieved by a successful result of the same. It further ignores and departs from the entire philosophy of all the opinions of the United States Supreme Court in upholding the constitutional guaranties of the 1st and 14th Amendments, as will be pointed out later herein.

We think that the fact findings and the conclusions of law therefrom upon which the Missouri court bases its affirmance of the judgment, are so intermingled that the facts must be analyzed in order to pass upon the Federal right set up by the Petitioners, and that such analysis can lead to no other conclusion except that such findings and conclusions must necessarily involve a decision of the question of law raised by Petitioners' claim of rights under Articles 1 and 14 of the Amendments to the Constitution,

and that when the cited decisions of this court upholding, delineating and applying such rights are considered, that there can be no controling non-federal grounds in the decision to support the judgment, and that the Federal rights claimed, if recognized and enforced, would require a different judgment.

This Court has said (*Milk Wagon Drivers Union &c* v. *Meadowmore Dairies*, 312 U. S. 287 l.c. 293, 61 S. C. R. 552 l.c. 555) that it is "of prime importance that no constitutional freedom, least of all the guaranty of the Bill of Rights, be defeated by 'insubstantial findings of fact, screening reality.' That is why this court has the ultimate power to search the records in state courts where a claim of constitutionality is effectively made."

It was the duty of the Missouri Supreme Court to follow controlling decisions of this Court upon constitutional questions necessarily involved in the decision, where such questions are inherent in the case. This the Missouri court failed to do. State statutes and judicial application thereof must give away to these constitutional provisions if the statute or the judicial application thereof infringes the rights claimed. Petitioners' contention is based on a long line of cases by this Court, starting with *Senn* v. *Tile Layers Union*, 301 U. S. 468 l.c. 478, 57 S. C. R. 857, wherein Mr. Justice Brandeis upheld the right of freedom of speech to union members engaged in picketing, to make known the facts in the labor dispute. Following this came *Thornhill* v. *State of Alabama*, 310 U. S. 88, 60 S. C. R. 736, in which the Federal constitutionality of Sec. 3448 of the Alabama Code was involved, which prohibited labor acts upon business premises for the purpose of influencing others to adopt certain enumerated courses of action, and which prohibited picketing for the purpose of hindering or interfering with or injuring any lawful business. This Court said, l. c. 60 S. C. R. 743, that this statute comprehended "every practi-

cal method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer." The Court held the statute invalid on its face as in violation of the 1st and 14th Amendments and announced the doctrine that "only in cases of grave and imminent danger to the community" could modifications and qualifications in the public interests be justifiably placed upon the constitutional rights. The case of *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 61 S. C. R. 122, followed, which clearly holds that a union effort to organize non-union milk peddlers who purchased milk from dairies for the purpose of making daily retail sales, constitutes a labor dispute within the meaning of the definition in the Norris-LaGuardia Act and that injunction could not be used to prevent the organization of these truck owning vendors who purchased milk from the dairies and resold it. This case goes even further than is necessary under the instant case, for the truck owner haulers here do not purchase the milk themselves but merely transport it for hire. In the instant case, of course, the restriction upon injunction in labor disputes set forth in the Norris-LaGuardia Act are not involved, but if, under the definition, a labor dispute existed there, it certainly does here, for the reason that the dispute is between persons who are engaged in the same industry, trade, craft or occupation or have direct or indirect interest in the production, processing, sale and distribution of milk.

Milk Wagon Drivers Union of Chicago v. *Meadowmore Dairies*, 312 U. S. 287, 61 S. C. R. 552, clearly upholds the basic doctrine of the *Thornhill* case, but might be construed to hold that where repeated acts of unquestioned violence occur, that such might be considered a justifiable reason for a modification or qualification of the "grave and imminent danger" doctrine, so long as such violence continued or threatened. The Court said, l. c. 61 S. C. R. 557, "Here

again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in the state court."

In *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. C. R. 568, which followed, there was no immediate employee-employer dispute but merely an effort to unionize a beauty parlor. The owner contended that under state law picketing was unlawful by persons not in proximate relation to the employment. This Court held, l. c. 570, that it was but "an instance of 'peaceful persuasion' without violence and free from 'picketing en masse or otherwise conducted' so as to occasion imminent and aggravated danger," and that the injunction ban was inconsistent with a guaranty of freedom of speech, that the scope of the 14th Amendment was "not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."

Next came *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769, 62 S. C. R. 816, where the union was attempting to unionize peddlers of baked goods who bought from bakeries and sold to small retailers on trucks which they owned themselves. The union attempted in good faith to bring into the union peddlers, with poor living and working standards, hours and compensation. When they refused, the union caused the bakeries to be picketed in a peaceful and orderly manner. The New York court issued an injunction on the basis that the peddlers were independent contractors and that no labor dispute existed. This Court reversed on certiorari and held l.c. 774 that "One need not be in a 'labor dispute' as defined by state law, to have a right under the 14th Amendment, to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive." In addition to this

case, in *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 64 S. C. R. 854 l. c. 859, this Court held that under the definition of "employee" in the National Labor Relations Act, that newsboys who were contended to be independent contractors were subject to union labor organization and the Court appended a footnote, l. c. 859, showing that organization and collective bargaining had long been common among many valid types of independent contractors.

In *Thomas* v. *Collins, Sheriff*, 323 U. S. 516, 65 S. C. R. 315, this Court strongly reaffirmed the doctrine of the *Thornhill* case and held, l. c. 65 S. C. R. 322, that the freedoms of the 1st Amendment possessed "a sanctity and a sanction not permitting dubious intrusions," and held that "for these reasons any attempt to restrict those liberties must be justified by clear public interests, threatened not doubtfully or remotely, but by clear and present danger." It will be noted that in this opinion this Court did not nullify the Texas Act or any section thereof and freely conceded the power of the state to regulate labor unions in the public interest, so long as such regulations did not trespass upon the constitutionally guaranteed rights of free speech and assembly.

In *Hunt* v. *Crumboch*, 325 U. S. 821, 65 S. C. R. 1545, this Court went much farther than any other reported decision, in upholding a labor union in its decision to sell or withhold labor on such terms as it chose, to associate or to decline to associate with other workers, or to accept, or refuse to accept, or to terminate a relationship of employment. Injunction was sought against the union by a hauling company holding a closed-shop agreement with a grocery chain. The grocery chain had a contract with the complaining hauler, who was non-union, and in conformance with its closed shop agreement, notified the hauler of the necessity to join the union, but the union refused to negotiate with the hauler or admit any of his employees to membership, apparently

out of spite or ill will. The hauler sought injunction, claiming a violation of the Sherman Act. The Court held that the only combination was one of workers alone, who had not combined with their employers to suppress the hauler's business, and what they refused to sell the hauler was their labor, and that it was not a violation of the Sherman Act for laborers, in combination, to refuse to work. That case arose under the Federal Anti-Trust law. This case arises under the Missouri Anti-Trust law. There is no great difference between the prohibitions of the Sherman Act and Sec. 8301 of the Missouri Statutes.

Other courts have struck down as contrary to the 1st and 14th Amendments state statutes which make it illegal for union members to refuse to handle, install, use or work on particular materials or equipment and supplies, because not produced, processed or delivered by members of a labor organization. See *Stapleton* v. *Mitchell, Attorney General,* 60 Fed. Supp. 51, with reference to Sec. 8 (12) of the Kansas Labor Law, and *Alabama State Federation of Labor* v. *McAdory,* 18 Sou. (2d) 810, involving Sections 12, 13 and 14 of the Alabama Labor Law. And in the very recent case of *Singer et al.* v. *Kirch Beverages, Inc.,* 65 N. Y. S. (2d) 400, the highest court in New York, in a case in its essential facts, exactly like the instant case, denied injunction upon the authority of the *Wohl* and *Crumboch* cases, *supra.*

Missouri has ample power through its legislative arm to regulate unions and their activities within the limits of the Federal Constitution. It has not seen fit to do so. Such rights are safely vested in its legislature and Missouri courts should not by judicial opinion, attempt to legislate on labor activities by unconstitutional construction of state statutes.

In view of these authorities, it is respectfully submitted that since the only union activities here were peaceful and all occurred upon the site of the industrial dispute, and

since there is no showing that Petitioners combined with their employers to effect the result sought to be achieved, and there is no showing of grave or immediate danger to interests which the state may lawfully protect, that the Missouri Supreme Court's decision that the public policy of the state will not permit the union activities shown here, must fall in the face of constitutional rights claimed by Petitioners.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting the Writ of Certiorari and thereafter reviewing and reversing said decisions.

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